In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 232

UNITED STATES OF AMERICA, APPELLANT,

v.

BOSTON AND MAINE RAILROAD, PATRICK B. MCGINNIS, GEORGE F. GLACY, AND DANIEL A. BENSON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE UNITED STATES

This brief is filed in response to the contention—made principally by appellee Boston and Maine (Br., pp. 16–32), but also by the individual appellees (Br., pp. 22–25)—that to interpret Section 10 of the Clayton Act so as to subject a corporation to criminal punishment for secret acts of its officers which operated to its detriment and which it could not prevent would contravene settled principles of criminal law.

Both the face of the statute and its legislative history leave no doubt that Congress recognized that carriers which failed to follow the statutory requirement of competitive bidding would be subject to

701-125—64

criminal prosecution without regard to whether the interlocking relationship which gave rise to the violation was secret or open, or whether the actions of the corporate officials were intended to benefit or harm the carrier. Indeed, the legislative history shows that one of the principal evils which Section 10 was designed to reach was the looting of carriers accomplished through self-serving dealings with buyers and sellers with whom the carriers' officials or directors had interlocking relationship. See our main brief, pp. 15, 17–18, 22. Carrier officers who engage in such looting of their companies are not likely to publicize their misdeeds to their fellow officers or directors.

Appellees' argument proves too much, since it would make the statute inapplicable to cases which appellees apparently concede would be covered (see B & M Br., p. 32). Assume, for example, that what had occurred in the present case was that, unknown to the other officers or to the directors of B & M, the carrier's selling officer secretly also was the purchasing officer of International; and that, in return for a share of the profits which International would make on the deal, he sold the B & M cars to International at the same price at which the sale charged in the present case was made. In so doing, the official would not be serving the interests of the B & M but would be injuring them; yet the carrier would not be aware of the misfeasance. There could be no possible question, however, that when the transaction took place without competitive bidding, the carrier could be prosecuted under Section 10. Perhaps in such a case

the trial court would impose a light sentence or even suspend sentence, as it might well do in the present case if the appellees are convicted. But the fact remains that in such a situation the carrier would have violated Section 10 even though (1) it had been the victim rather than the beneficiary and (2) it had been powerless to prevent the looting.

To be sure, Congress did not articulate the reasons which led it to conclude that a carrier should be subject to criminal prosecution for violating the competitive bidding requirement without regard to whether such violation aided or injured it. Both the statute itself and its history leave no doubt that Congress intended that result. Since officials and directors of a carrier can be criminally liable under the statute only if the carrier itself committed a violation, the acceptance of appellees' interpretation of Section 10 would mean that such officials and directors would escape punishment thereunder even though, as alleged in the present case, they were guilty of the most shocking breaches of their fiduciary obligations to their companies.

There are, in fact, cogent reasons which justify the congressional decision to subject carriers to criminal liability for violating Section 10 even though, under traditional standards governing corporate criminal liability, their violations might not be deemed wilful or knowing (see below p. 5). The publicity that inevitably would accompany the conviction of a corporation for violating Section 10 itself would have the salutary effect of informing the public of what has taken

place, and it might encourage stockholders to rid the company of incompetent or dishonest management. Moreover, the imposition of criminal penalties on the corporation is appropriate in order to induce corporate officials to take action in situations where an interlocking relationship is the factor that influences the carrier to deal with particular buyers or sellers, but the absence of competitive bidding does not injure the carrier because it does just as well in dealing with those persons as it would in dealing with others.[1] In such a case an official of a carrier who knows or suspects that his colleagues are engaging in such favoritism may decide not to do anything about it because the corporation is not suffering. The threat that the corporation may be criminally prosecuted and fined for such violation thus may be the principal impetus to inducing such official to stop the practice.

Section 10 is a prophylactic statute designed to prevent dealings between carriers and buyers or sellers with whom it has interlocking relationships except pursuant to competitive bidding. In many situations it may be difficult, if not impossible, to ascertain whether there has been any actual over-reaching in such dealings. Section 10 thus embodies the basic concept upon which all conflict-of-interest statutes rest: that because of the possibility of evil, particular conduct is to be prohibited or regulated without re-

[1] In such a case an antitrust objective of Section 10 is nevertheless frustrated, for the substantial business of a railroad may be directed to a single source, to the exclusion and competitive injury of the latter's competitors.

gard to the actual impact of the particular transaction on the affected company.

Congress could have made it a crime for an officer of a carrier, who is not himself a party to dealings between a carrier and firms with whom it has interlocking relationships, negligently to fail to take necessary steps to stop them. Congress did not act unreasonably in selecting the less severe sanction of inducing corporate officials to take such action by subjecting the corporation to criminal prosecution if they fail to do so and limiting the individual's liability to cases where they acted "knowingly."

None of the numerous cases upon which the B & M relies to show that corporations are not subject to criminal prosecution on the basis of acts of their officials which injure them (Br., pp. 17–27) held that the legislature could not make a corporation criminally liable for acts done without knowledge or intent. Indeed, in *Standard Oil Co. of Texas* v. *United States*, 307 F. 2d 120 (C.A. 5), upon which B & M relies heavily (Br., p. 24)—the court recognized (p. 125) that "it is perfectly clear that Congress may in certain areas impose criminal liability on a corporation for the mere doing of the proscribed act wholly unrelated to knowledge, actual or constructive * * *." Congress did precisely that in Section 10 of the Clayton Act, and the imposition of such absolute criminal liability in this important regulatory statute was neither arbitary nor without reasonable basis. Cf. *United*

States v. *Balint*, 258 U.S. 250; *United States* v. *Dotterweich*, 320 U.S. 277.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
JOHN H. DOUGHERTY,
Attorneys.

JANUARY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965